

National Committee on Pay Equity

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RECOMMENDATIONS TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

December 1983

Introduction

The National Committee on Pay Equity calls on the EEOC to move to eliminate wage discrimination against predominantly female and minority jobs, specifically by fully enforcing the legislative prohibition against wage discrimination under Title VII of the Civil Rights Act.

The National Committee on Pay Equity is a coalition of individuals, labor unions, women's and civil rights groups, educational associations, state and local government agencies and others. It is dedicated to achieving pay equity. It provides leadership and assistance in order to stimulate pay equity initiatives in the areas of organizing, collective bargaining, research, state and local legislation, and enforcement of existing laws.

This document sets forth specific recommendations which we believe the EEOC can and should adopt in order to be in compliance with its legislative mandate to enforce the prohibition against "discrimination in compensation" embodied in Title VII of the Civil Rights Act of 1964. We believe that the EEOC is not presently meeting this obligation. We have updated the document to reflect such changes as have occurred in the status of our struggle to achieve pay equity.

The Judicial Setting

In June, 1981, the United States Supreme Court issued its decision in Gunther v. County of Washington. Gunther provided unequivocal confirmation of the position advanced by many advocate groups and adopted by several courts that wage discrimination against women who hold jobs which may not be substantially equal to those held by men, like all other forms of actionable discrimination under Title VII, is barred by the Civil Rights Act of 1964. Since the issue before the Supreme Court in Gunther was a narrow one, the Court deliberately left open several questions as to the form and type of proof necessary to establish a wage discrimination violation under Title VII. Lower courts, however, both before and after Gunther have acted to fill that void. Thus, a wealth of case law establishes that plaintiffs may make out a showing of wage discrimination by presenting evidence of intentional discrimination in the wage-setting process itself, or with respect to other aspects of job selection and assignment which directly impact on wage-setting. In other cases, courts have relied upon relevant statistical evidence to find a pattern or practice of wage discrimination. Finally, courts have applied the Griggs-type disparate impact analysis to claims of wage and benefits discrimination against women, that is, they have found

unlawful discrimination where the effect of an apparently sex-neutral wage policy was disproportionately low wages for women.

EEOC Actions

While the lower courts have acted promptly and decisively to answer the questions left open by Gunther, over the past year the EEOC has failed to provide the guidance and leadership which Title VII demands of it in the area of wage discrimination. Before Gunther, the EEOC commissioned a study by the National Academy of Sciences to determine both the manner in which conventional wage-setting practices operate to discriminate against women and the feasibility of creating bias-free wage-setting mechanisms. The results of that study were published in the fall of 1981, shortly after the Gunther decision, and provide a sound basis upon which the Commission could rely in investigating charges of wage discrimination. Equally important, this pre-eminent NAS study should serve as the basis for policy development by the Commission in this important area of discrimination. To date, however, the Commission has largely ignored the findings of the study.

Similarly, the Commission held a series of hearings on wage discrimination and job segregation in the spring of 1980. These hearings provided a wealth of information for the Commission to utilize in processing individual charges, developing systemic targets for investigation and litigation, and formulating sound policy in this area. Again, however, the Commission has merely published the transcripts of these hearings; it has taken no action to date in the form of issuing findings from the hearings or implementing any new initiatives based on the hearings or the NAS study.

From a litigation perspective, the Commission participated as amicus in Gunther, IUE v. Westinghouse, and Kouba v. Allstate.^{5/} It is our further understanding that the Commission may have participated in some way in a few other wage discrimination cases over the past three years. This participation was not publicized. Thus, as was true with the National Academy of Sciences study and with the wage discrimination hearings, the EEOC has dropped the ball in the area of litigating wage discrimination cases. The Supreme Court has spoken in Gunther, several circuits have rendered favorable decisions, and a number of lower court cases are pending. In light of the developing case law, and keeping in mind that in Los Angeles Department of Water and Power v. Manhart,^{6/} the Supreme Court was critical of the Commission for its failure to provide guidance, it is incumbent upon the Commission to assume the leadership in this area.

Indeed, the only positive enforcement action which the Commission has taken in the wake of Gunther was the issuance on September 15, 1981, of a 90-day notice to "provide interim guidance in processing Title VII and Equal Pay Act claims of sex-based wage discrimination." That notice has been renewed every 90 days since its original promulgation, and thus represents the policy to which

the EEOC has committed itself with respect to processing wage discrimination claims. While the National Committee believes that certain sections of the 90-day notice warrant further consideration and fleshing out, it represents for the most part a sound document and policy initiative upon which the Commission should continue to rely. However, it is only a first step and the time for additional action by the EEOC is long overdue.

National Committee on Pay Equity Recommendations to the EEOC

The National Committee for Pay Equity strongly urges the Commission to undertake the following steps immediately to assure that wage discrimination investigations, litigation and policy development under Title VII again move forward promptly, decisively and equitably. We recommend that the Commission consult with the National Committee on Pay Equity on an ongoing basis.

(1) The Commission should vigorously enforce the policy embodied in the 90-day notice issued on September 15, 1981. Wage discrimination charges should be investigated fully, in accordance with the instructions supplied under the heading "Investigating Charges." The Commission should, on an on-going basis, review the 90-day notice to determine where and how it may be enlarged upon and clarified in order to provide more precise guidance to the regional EEOC offices which perform the initial investigation of charges. As part of its review of the 90-day Notice, the Commission should determine the manner by which the findings of the NAS study as well as its own hearings will be integrated into this basic policy document and form the basis for further guidance for the field.

(2) Because the development of wage discrimination policy and litigation is still embryonic, it is essential that charges filed in the field offices receive careful and specialized review to determine the appropriate processing mode. Under present procedures the Commission treats potential lawsuits, charges against public institutions, and preliminary relief cases in this manner. The Commission should give all wage discrimination charges such attention. This means that EEOC intake staff should be trained in the identification of wage discrimination charges; lawyers or wage specialists should assist in the intake interviews, where possible, of wage discrimination claimants; the intake supervisor should carefully review all charges designated as wage charges prior to assignment to any processing unit; and, where appropriate, high-level management in each field office should become involved at critical stages of decision-making with respect to wage discrimination charges.

Tight time frames should be instituted in the review and processing of wage discrimination charges. The Commission should carefully monitor the process at each step to ensure that these time frames are met.

In addition, the Commission should provide to the National Committee on Pay Equity information on a regular basis about the number of wage discrimination charges filed and the number of those cases that the Commission has decided to pursue. To the extent that this information cannot be provided without a change in the Commission's reporting system, the Committee would recommend that the reporting system be changed.

(3) The 90-day notice requires that wage discrimination charges be referred to Headquarters for review in order to enable the Commission to develop uniform law and policy in this area. However, the experience of many constituent members of the National Committee who assist individuals in filing Title VII charges or engage in monitoring of field offices has shown that, contrary to the policy embodied in the 90-day notice, individual field offices have failed or refused to refer charges to Headquarters. The Commission should establish a mechanism for assuring that all wage discrimination charges received by field offices are referred to Headquarters.

(4) A Headquarters task force, similar to the Pregnancy Litigation Task Force, should be established for the purpose of reviewing wage discrimination charges; developing investigative techniques; and formulating wage discrimination policy. The task force should be composed of representatives from those units most directly affected by and expert in the area of wage discrimination, i.e., the Office of Program Operations, including specifically the Systemic Unit; the Office of Program Research; the Office of Legal Counsel; and the Office of General Counsel, including specifically the Appellate Division.

In addition, the National Litigation Plan recently proposed by the General Counsel should include wage discrimination as one of its priorities. Those developing the Plan should work in conjunction with this Task Force so that a wage discrimination litigation strategy will actually be implemented. District offices should be assessed on the basis of the number of wage discrimination cases which are processed.

(5) Each appropriate unit in Headquarters should be assigned specific tasks in the area of wage discrimination. Thus, for example, the Systemic Unit should be directed to develop systemic targets, with an eye to engaging in systemic litigation of wage discrimination claims. The Office of Program Research should undertake research and planning in the following areas: the manner in which the so-called "free" market affects wage-setting, how the market may be manipulated or used to create or maintain a discriminatory wage structure; the sources of bias in job evaluation and other wage-setting mechanisms; an identification of industries and jobs, similar to that which the Commission undertook under the Equal Pay Act, where wages are likely to be depressed because of sex and/or race discrimination; and the various indicia of historical or present intentional discrimination in wage-setting.

The Office of Program Operations should retain professional job evaluators to develop training materials for investigative staff in the field.

The National Committee strongly urges the Commission to consider these proposals both seriously and favorably.

FOOTNOTES

^{1/} See, e.g., Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), petition for reh. denied, 623 F.2d 1303 (1980), aff'd 452 U.S. 161, 101 S.Ct. 2242 (1981); Fitzgerald v. Sirlain Stockade, 22 FEP Cases 262 (10th Cir. 1980); IUE v. Westinghouse, 631 F.2d 1094 (3rd Cir. 1980); Taylor v. Charley Bros., 25 FEP Cases 602 (W.D. Pa. 1981).

^{2/} IUE v. Westinghouse and Taylor v. Charley Bros., supra; Gerlach v. Michigan Bell Tel. & Tel. Co., 24 FEP Cases 69 (E.D. Mich. 1980).

^{3/} Wilkins v. Univ. of Houston, 654 F.2d 388 (5th Cir. 1981); see also Heagney v. Univ. of Wash., 642 F.2d 1157 (9th Cir. 1981) (district court erred in excluding report which showed that among exempt employees, two times as many women as men had salaries below the mean expected base on the job evaluation while three times as many men as women had salaries higher than the expected mean).

^{4/} Wambhein v. J.C. Penny Co., Inc., 642 F.2d 362 (9th Cir. 1981); Neely v. MARTA, 24 FEP Cases 1610 (N.D. Ga. 1980).

^{5/} Kouba, 691 F.2d 873 (9th Cir. 1982), was a classic equal pay case. It has, however, been termed as a wage discrimination case. It was the first post-Gunther case, and, indeed, arose in the Ninth Circuit, as did Gunther. Kouba was the first case in which there was an opportunity to address Gunther in a wage discrimination setting.

^{6/} 435 U.S. 702 (1978).

^{7/} In this regard, the National Committee notes with alarm the growing number of employers who justify discriminatory wage rates through reference to the market rate. The report by the National Academy of Sciences provides ample evidence that reliance on the market to set or defend wages embodies sex-based discrimination. Moreover, there is substantial evidence in individual cases, e.g., IUE v. Westinghouse, that the market rate has not been followed; rather, wage rates for women's jobs have been and are being deliberately depressed simply because the occupants of those jobs are women. The Commission's hearings on job segregation and wage discrimination also provide a strong evidentiary basis from which the notion that the market operates to set wages may be attacked. Witness after witness testified as to the unresponsiveness generally of the market to shortages in traditional women's jobs; the inability of women to negotiate for higher wage rates, despite the demand for their work; the near-universal pattern of women being paid less than the lowest-paid man in their workplace, regardless of the work done by each; and the various mechanisms utilized by employers to assure that women's wages continue to be depressed. Against this backdrop, it is clear that there is something at work which operates to maintain low wages for women workers, but it is not the invisible hand of Adam Smith. It is, rather, garden-variety sex discrimination of a type which the Commission has heretofore been unwilling to countenance.